Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-2050, 88-90, 88-96

In the
Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, *Petitioners,*

and

CHABAD, *Petitioner,*

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR, *Respondents,*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNSEL FOR RESPONDENTS
American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle Michael Antol, Reverend Wendy L. Colby, Howard Elbling, Hilary Spatz Levine and Max A. Levine

August 12, 1988

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BRIEF FOR RESPONDENTS* IN OPPOSITION

Respondents submit this brief to demonstrate that the Petition for Writ of Certiorari should be denied.

*Respondents include American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Howard Elbling, Hilary Spatz Levine and Max A. Levine.

COUNTER-STATEMENT OF THE CASE

The facts of the case are accurately summarized in the Circuit Court's opinion. Respondents make the following additions to clarify and/or correct some of the statements expressly or impliedly made in the three petitions for certiorari.

The government displays here enjoined were religious symbols, not part of, or subsumed by, any larger secular display. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 662 (3d Cir. 1988). They were placed at or in public buildings devoted to core functions of government. *Id.*

The Allegheny County Courthouse is the seat of county government, housing not only the County's executive officers, its controller, treasurer and sheriff, among others, but in addition some of its criminal and civil courts. *Id.* at 657. Among the Courthouse visitors, therefore, are those who are present under compulsion of law. (*See* App. 157a).[1]

The County stores, moves, and decorates the nativity scene each year. 842 F.2d at 657. The nativity scene, containing the traditional figures (varying in height from 3 to 15 inches), *id.*, derived from the gospels of Luke and Matthew, is approximately 5 by 3 feet (9 feet including its surrounding fence) and stands alone, occupying one-half or more of the grand staircase. (App. 101a, 124a, 171a, 205a, 228a). The creche is a traditional religious display, adhering to Christian religious teachings. (App. 171a). The traditional Mary, Joseph, the infant Jesus and figures kneeling in adoration are topped by an angel bearing a banner with words from the gospel of Luke "Gloria in Excelsis Deo"

[1] "App." refers to the Joint Appendix filed in the Court of Appeals.

(Glory to God in the Highest) (*Luke 2:14*). (App. 104a-107a, 393-394a). 842 F.2d at 657. A Catholic priest testified without contradiction that the creche is indistinguishable from those commonly displayed in Catholic churches. (App. 104a, 130a). No evidence was ever submitted, or argument suggested, that the Courthouse area in any way constituted a public forum.

The City-County Building is the principal headquarters for City of Pittsburgh government, housing its mayor and its legislative body (city council) as well as numerous government offices, the principal civil trial courts, and Pennsylvania appellate courts (Commonwealth, Superior and Supreme). (App. 131a, 147a); 842 F.2d at 657. Here also among the visitors are those who come under compulsion of law (jurors and subpoenaed witnesses).

Contrary to the City petitioner's implication that the Menorah was one of a number of items included in a larger display, the City's Christmas season display consisted solely of the Christmas tree and its ornaments, the platform (on which the tree stood), the sign "Salute to Liberty" below the tree and to one side, the Menorah. *Id.* Signs advertising a fund drive and a flower display were in front of the building but, as examination of the photograph (Pet., Chabad, 4) reveals, these were not part of some large display which included the Christmas tree and Menorah. *Id.* at 657-658. While the Menorah was placed near the Christmas tree, it was in no way "subsumed by a larger display of non-religous items." *Id.* at 662. Even the district court's denial of an injunction acknowledged that Chabad, an orthodox faction of the Jewish religion, advocates the display of Chanukah Menorahs (lighted by Jews during the eight nights of the Jewish Chanukah festival) during the

holiday "to symbolize the lighting of the souls of the Jewish people." *Id.* at 658. The district court indeed recited that the Menorah may call attention to the public that the Jews "also have a miracle to remember." *Id.*

The placement of the Christmas tree was not questioned by any of the parties and no proof was offered nor argument made as to its being a Christian symbol. No finding was made with respect to the Christmas tree since petitioner Chabad's "neutrality" argument was never raised prior to appeal.

Although the rabbinical experts for the plaintiff and the intervenor each put a different focus upon the Menorah, the record unquestionably supports the circuit court's finding that the Menorah's sectarian character is clear. *Id.* at 662. Without attempting to resolve the distinction between plaintiff's expert's testimony that the Menorah is a religious symbol and the argument offered by Chabad's expert that the Menorah need not be treated in the same manner as other religious "objects", the circuit panel relied upon the appropriate "effects" test in rejecting the district court's suggestion that governments may assist certain religions by helping them to call attention to the miracles enriching their histories. *Id.* at 663.

With respect to the Menorah, as petitioner City of Pittsburgh acknowledges, "the display was solely that of the City" (Pet., City, 4). As with the Courthouse, no suggestion was ever raised or evidence submitted that the steps of this government building would in any way constitute a public forum.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari should be denied since there is no novel or certworthy question raised on this record nor any unanswered legal question to be resolved by the Court; there is neither conflict among the circuits nor is there conflict with any opinion of this Court. Furthermore, the necessary facts to support the arguments now being improperly raised are not part of the record below.

I. There are no "special and important reasons" to justify review by this Court.

Resolution of the present case did not involve any unsettled questions of federal constitutional law. The decision required no more of the court than to apply this Court's controlling precedents and applicable constitutional doctrine to the facts before it; this it did. Contrary to the petitioners' suggestions that the Court of Appeals opinion is in conflict with or misapplies this Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the opinion faithfully considered and applied both *Lynch* and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the controlling precedents.

In *Lynch*, this Court delineated the limited circumstances in which the official display of a nativity scene by a governmental body in a privately owned park would be consistent with the commands of the Establishment Clause. That case held that the *inclusion* of a nativity scene in an extensive Christmas holiday season display, otherwise consisting entirely of the secular symbols of Christmas, did not violate the Establishment Clause in that setting. This was because the inclusion of the nativity scene in the display was related to the *secular* purpose of the display

itself, the City's official celebration of the national holiday, and so did not impermissibly involve the City in the endorsement of religion. In that context the nativity scene was deemed to have lost most of its religious significance and did no more than depict the historical origin of what has become a primarily secular holiday. The *Lynch* opinion used the three prongs of the *Lemon* test in its analysis.

The two religious displays here at issue were each located at or in a public building (the Allegheny County Courthouse and the City-County Building) "devoted to core functions of government", 842 F2d. at 662, including in each the chambers of the principal elected officials and legislative bodies as well as trial and appellate courts. The critical fact that neither religious symbol could reasonably be deemed to be subsumed by some larger display, as the appeals court stated, is further illustrated in the photograph introduced (Respondents Ex. 10, App. 396a), the uncontradicted testimony that the nativity scene substantially mirrors those found in Catholic churches, and in the photographs of the Menorah reproduced in petitioner Chabad's petition, page 4.

As is discussed in Section II, the Federal Courts of Appeal have consistently found such displays violative of the Establishment Clause.

II. The Federal Courts of Appeal are in agreement that any official display of a religious symbol at or in a public building devoted to core functions of government is violative of the Establishment Clause.

In an attempt to persuade the Court that this case falls within the parameters set forth in Rule 17, Supreme Court Rules, two of the petitioners (the County and the City) assert that there is a conflict among the circuits. The third

petitioner, Chabad, does not adopt that assertion although it references the majority opinion's description of "different approaches"—something quite different from a conflict. Obviously, differing and distinguishing fact patterns give rise to "different approaches". An analysis of the referenced opinions, however, shows clearly that there is no conflict in the circuits where the question raised is whether government may officially display a religious symbol in a public building devoted to core functions of government. Three circuits have now considered that question and they have uniformly held that such official displays violate the Establishment Clause. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 421 (1986); *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *American Civil Liberties Union v. County of Allegheny, supra.*

The attempt to "find" a circuit conflict is based upon the assumption that the Second Circuit holding in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd. by an equally divided Court sub nom Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985), is in conflict with the Third Circuit's decision here and with the Sixth and Seventh Circuits as well. (Pet., City, 12; Pet., County, 14). Examination of *McCreary* shows that the facts there extant are simply not analogous to those here or in *Birmingham* or *Chicago*. *McCreary* dealt with a creche to be displayed by private parties in a public park which was a traditional public forum. The linchpin of that holding was the *public forum* analysis, as demonstrated by the court's long explanation of the various First Amendment uses for which the park was available. *McCreary*, 739 F.2d at 718-719. Indeed, the very first paragraph of the court's "discussion" explains that Boniface Circle, the park used,

was "a traditional public forum". *Id.* at 722. That critical fact is not present, nor was it in the Sixth and Seventh Circuit decisions.

In *American Civil Liberties Union v. City of Birmingham*, the Sixth Circuit struck down a city's official display of a freestanding nativity scene on the City Hall front lawn. It did so by carefully following and applying the *Lynch v. Donnelly* analysis. The opinion is not in conflict with the Second Circuit's holding as petitioners would suggest. The court, in discussing *McCreary*, specifically references the fact that the public forum issue was present in *McCreary (see, Birmingham,* 791 F.2d at 1565), as it was not in *Birmingham.* The Sixth Circuit's only suggestion of disagreement with *McCreary* was to the City's argument that that case should be construed as permitting placement of an unadorned creche in a prominent position at the government's official headquarters. *Birmingham,* 791 F.2d at 1566. Since the *McCreary* case did not involve any such official display but rather a city's refusal to allow a private group to display a nativity scene in a traditional public forum during the Christmas holiday season, *Birmingham* can hardly be deemed to be in disagreement with *McCreary.* The court's "disagreement" was with the argument advanced that *McCreary* should be extended to include religious displays at government headquarters.

In *American Jewish Congress v. City of Chicago,* the Seventh Circuit struck down, as violative of the Establishment Clause, the City's display of a free-standing creche (not part of a larger display) in the City Hall. The court reasoned that City Hall is a setting where the presence of government is "pervasive and inescapable". *Id.* 827 F.2d at 126. There, as here, the government offices were located in the site and the city council held its meetings there as

well. Bringing together "City Hall" and the church (via a creche), reasoned the court, unmistakably suggested their alliance. *Id.* The court noted *McCreary (id.* at 126, n. 2) but found it "uninstructive", as it took note of the different factors there present.

The recent decisions of other federal courts of appeal are consistent with the Third, Sixth and Seventh Circuit holdings with respect to official displays of religious symbols. In *American Civil Liberties Union v. City of St. Charles,* 794 F.2d 265 (7th Cir. 1986), *cert. denied,* 107 S.Ct. 458 (1986), the Seventh Circuit invalidated the City's display of a lighted latin cross on a city building during the Christmas holiday season. In *Friedman v. Board of County Commissioners of Bernalillo County,* 781 F.2d 777 (10th Cir. 1985) the Tenth Circuit struck down a county government's use of a seal which contained the latin cross and the Spanish motto meaning "with this we conquer". In *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098 (11th Cir. 1983), the Eleventh Circuit invalidated the display of a lighted latin cross in a state park. The courts of appeal are in clear agreement that any official display of a purely religious symbol by a government body violates the Establishment Clause. Obviously such displays at the seats of government fall into the most egregious category.

III. The Court of Appeals Decision is Not in Conflict with *Larson v. Valente.*

A. The Facts are not apposite.

Petitioner Chabad, without analysis, and with only two brief quotes from the case of *Larson v. Valente,* 456 U.S. 228 (1982), asserts a conflict of that opinion with the instant case. The actual *Larson* opinion, its reasoning and

its factual basis fails to support a 'conflict' analysis since the case deals with facts totally inapposite to those here. *Larson* dealt with the state's impermissible regulation of some religions. The case struck down a Minnesota statute that specifically discriminated against those religious organizations that solicit more than 50% of their funds from non-members, by imposing upon them certain registration and reporting requirements. No such discrimination is part of this case. There was never any balancing by the government of requests by religious groups or different treatment of religious requests by the governmental entities in the case now before this Court. There is no evidence to suggest that the Christmas tree was requested, sponsored by, or erected by anyone other than the City. In fact the record shows clearly otherwise.

Actually the inconsistency of Chabad's two proffered positions that, on the one hand, the Menorah display does not endorse religion because it is a "non-religious" object but that, on the other, it is necessary to "neutralize" an otherwise Christian symbol is obvious. If the Menorah does not connote the Jewish (or some other) religion then it can hardly be said to neutralize the governmental display of an object which, according to Chabad, connotes or endorses Christianity.

B. The issue of whether a Christmas tree is an "exclusively Christian" symbol was never raised in this case and is therefore waived.

Petitioner, Chabad, attempted to raise for the first time on appeal its assertion that the City's display, except for the Menorah, is otherwise "exclusively Christian". Indeed, Co-Petitioner, City of Pittsburgh moved the circuit court to strike that argument on the ground that it had

never been an issue in the district court proceedings. Since it was not an issue, no proof or argument was offered in this record and no findings on that issue were requested of or made by the district court. The Court of Appeals gave no consideration in its opinion to this assertion.

C. Chabad's asserted conflict with *Larson v. Valente* depends for its validity on two assumptions, neither of which is a fact or a holding in this case.

1. Assumption: The Christmas tree is a religious symbol.

Chabad's statement that the City "opened the steps of the City-County Building to the various Christian denominations that celebrate Christmas" (Pet., Chabad, 10) implies that the tree, like the Menorah, was placed and was owned by a religious group. Such implication is not only unsupported by the record, it is clearly contrary to the facts. As the Court of Appeals affirms, the City itself has installed the Christmas tree on the front steps to the main entrance of the City-County Building for many years. At the trial of this matter, neither Chabad nor any other party offered testimony or advanced argument that the Christmas tree was a Christian symbol, let alone that the Menorah's function was to neutralize it. No findings were ever requested nor were any made with respect to this assertion. Certainly Chabad never requested nor asked the court to consider a requirement that the City remove the tree if the Menorah were not permitted to be displayed. Furthermore, Chabad cites no authority for its bald assertion that a Christmas tree is Christian and not a secular symbol, totally ignoring the suggestion to the contrary in the few cases that have considered this question.[2]

[2] *See*, for example, *St. Charles*, 794 F.2d at 271.

2. Assumption: The Menorah "neutralizes" the Christmas tree.

Chabad's neutralization or curative analysis fails, unless one accepts its proffered "effect" that the placement of an 18 foot Menorah off to one side of a 45 foot high Christmas tree, atop a 20 foot platform, centered at the entrance to the government building, somehow conveys a message that the City of Pittsburgh is neutral or even-handed toward religion.

In fact, the message might more logically be said to be that the City of Pittsburgh endorses two religions. Clearly the preferred religion is Christianity (if one accepts Chabad's assumption) with its overpowering centrally displayed symbol, but as a secondary choice, it approves the Jewish religion as well. The suggestion that a display that advances Christianity and Judaism is one that is required by *Larson v. Valente* ignores the message conveyed to those who are neither Christians nor Jews. The record, as to the religious makeup of the area clearly shows that it includes Moslems, Unitarians, (App. 38a) (indeed one of the respondents is a Moslem and another a Unitarian minister), Buddhists and atheists. Moreover, the record is clear that Moslems object to any sort of religious display. (App. 143a-144a).

Chabad's suggestion that *Larson* requires or teaches that a symbol of one religion must be balanced by the countervailing religious symbols of another ignores the multi-religious makeup of most American cities and this Court's teaching in *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 389 (1985) (emphasis added), that "Government promotes religion as effectively when it

fosters a close identification of its powers and responsibilities *with those of any - or - all religious denominations* as when it attempts to inculcate specific religious doctrines."

Petitioner, Chabad, suggests that the Court may wish to grant its Petition for Certiorari to resolve the constitutional questions raised by the presence of a Menorah adjacent to a publicly sponsored Christmas tree without revisiting the issues discussed in *Lynch v. Donnelly.* Were the Court desirous of resolving that issue, respondents respectfully suggest that the factual posture of this case is such that it would be a poor vehicle for making such analysis. Because the arguments now proffered by Chabad were not raised in the district court, the issues of a Christmas tree's being a Christian symbol and of a Menorah's neutralizing that symbol have not here been litigated. It is respectfully submitted therefore that the many cases cited by Chabad (Pet., Chabad, 11 and 12) which apparently focus on the issues it now raises will afford more appropriate opportunities for full anaylsis, review, and clarification.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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